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Submission to Review of the Food and Grocery Code of Conduct

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Introduction

1. eastAUSmilk is the voice of dairy farmers in New South Wales and Queensland. It was formed from the amalgamation of Dairy Connect in New South Wales, and Queensland Dairyfarmers' Organisation.
2. We thank you for the opportunity to make a submission to the 2023-24 Review of the Food and Grocery Code of Conduct, and for tolerating our submission being provided a couple of days late.
3. Dairy farmers, daily, are in contact with milk processors and supermarkets: their staff and contractors, and, often enough, their managers. eastAUSmilk frequently has contact with a similar range of people. In many of those conversations, issues are raised, and things said, which processors and supermarkets will not say publicly. Much of this submission is based on those conversations.
 - a. Those individuals (farmers, and staff and contractors of processors and supermarkets) would be most reluctant to make even an anonymous submission to the inquiry, for the same reason as their reluctance to make public comment: certainty and fear of retaliation.
 - b. We are also told that historically, supermarkets find it far too easy to find out what has been said when their suppliers or farmers talk with public servants or Members of Parliament – confidentiality is often promised but not always delivered, so the risk of even confidential submissions or discussions is too great.
 - c. Some of our discussions are with senior staff of processors – we are not simply repeating the kind of gossip which might flow between under-informed and more junior staff.
 - d. We have consequently addressed the issue of retaliation in some depth.

In Summary

4. eastAUSmilk supports, and urges that the Review and Government support:
 - a. making the Food and Grocery Code of Conduct mandatory,
 - b. requiring major supermarkets to report their product line margins in real time, and
 - c. encouraging larger parties to the Code to embed policies, practices, and training, which are effective in eliminating retaliatory and bullying behaviour.

The Circumstances of Dairy Farmers

5. Dairy farmers are nearly always price takers and cannot pass on additional costs.
6. While some dairy farm enterprises are large, with big herds and many employees, many are very small businesses with few, if any, employees. In many cases, the principal employee is the business owner, supported by additional family members.
7. Many dairy farmers are only now beginning to recover from the financial and emotional impact of dollar-a-litre milk, and floods and droughts, and remain in debt. Many are only, just recently, able to begin to reduce that accumulated debt.
 - a. This drives a lack of confidence, and a wariness about investment.
 - b. That wariness extends to borrowings big and small, and consequently inhibits uptake of business, and modernisation, opportunities.
8. The dairy industry is extraordinarily variable across the nation, and this includes:
 - a. Breeds of cattle,
 - b. Farm size,
 - c. Production systems,
 - d. Production cycles, including breeding timing,
 - e. Productions costs,
 - f. Production risks, including climate,
 - g. Farm profitability,
 - h. Proximity to processors,
 - i. Competition for farmgate raw milk – some dairy farmers have several processors to whom they might sell, while some have only one, and
 - j. Markets serviced (for example, almost all milk produced in Queensland goes to domestic milk consumption, while nationally about 30% is exported).
9. This means it is wrong to regard the industry as homogenous, when making policy decisions or drawing conclusions, and entirely wrong to rely on averages or industry wide trends.
 - a. Yet governments of every stripe are advised by their public servants to do just that.
 - b. Regional needs and place-based solutions are effectively ruled out or built to fail.
10. We refer you to the 2018 report of the Australian Competition and Consumer Commission on the operation of the dairy market in Australia, for background on how dairy farmers participate in the market – it provides very useful background, and, while introduction of the Dairy Industry Code moved towards making the market more fair, it is not at all a complete solution and many of the problems and unfair practices identified by the ACCC continue to this day. The code is discussed further, below.

Dairy Industry Code

11. The Dairy Industry Code commenced on 1 January 2020, and applied to milk bought and sold from 1 January 2021. It is mandatory, binding on dairy farmers and processors.
12. The Code arose from an Australian Competition and Consumer Commission inquiry (2016-8, <https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/dairy-inquiry-2016-18>) which reported on 30 April 2018, recommending, *inter alia*, a mandatory code.
 - a. The Terms of Reference of this inquiry, and disingenuous analysis provided to the ACCC, ensured the report and code were much more about the relationship between processors and dairy farmers, than the role of the retail sector.
13. As is noted on the Australian Competition and Consumer Commission website, the code aims to promote fair trading in the dairy industry by imposing minimum standards of conduct on farmers and processors.
14. These minimum standards of conduct were supposed to account for the imbalance in bargaining power between dairy farmers and processors, and address longstanding industry practices which were seen to be unfair or had the effect of deterring farmers from responding to market signals.
15. The 2018 report made many findings adverse to the behaviours of milk processors, and other features of the operation of the market, including¹:
 - a. There is a large imbalance in bargaining power and information that exists between dairy farmers and processors.
 - b. Processors could impose milk prices and other terms of milk supply contract terms that are heavily weighted in their favour. Some milk supply contracts also contain terms that restrict farmers' ability to change processors for a better offer.
 - c. Dairy production efficiency and the effectiveness of competition between processors is thereby harmed.
 - d. A voluntary code would be inadequate to address the issues, and a mandatory code would improve the quality of information and price signals available to dairy farmers, enable fairer allocation of risk and enhance competition by removing switching barriers.
 - e. The retail price for milk is set by retailers arbitrarily and has no direct relationship to the cost of production for the supply of milk.
 - f. Because almost all contracts for the supply of private label milk allows processors to pass through movements in farmgate prices to supermarkets, there is no direct relationship between retail private label milk prices and farmgate prices.

¹ <https://www.accc.gov.au/media-release/accc-calls-for-regulatory-reform-to-assist-dairy-farmers>

- g. If supermarkets agreed to increase the price of milk and processors received higher wholesale prices, processors would still not pay farmers any more than they have to secure milk.
 - h. Increases in the supermarket price of private label milk are unlikely to increase the farmgate prices received by farmers, unless farmers have improved bargaining power in their negotiations with processors.
 - i. Introducing the code won't fully correct the bargaining power imbalance, but will reduce some of the negative consequences.
16. Much of the content of the mandatory dairy code is similar to or the same as the content of the voluntary grocery code.
- a. Major supermarkets which purchase milk directly from farmers are already bound by the mandatory terms of the Dairy Industry Code, as well as their voluntary commitment to abide by the similar terms of the Food and Grocery Code.
 - b. They cannot, therefore, be said to be unreasonably burdened by a mandatory Food and Grocery Code in similar terms to the current Code.
17. The Commonwealth government has recently modified the dairy code to modify the requirement for a review of the Code to be completed by 31 December 2023, and that review must now be completed by 31 December 2026.
18. eastAUSmilk is exceptionally disappointed by this change, as we are of the view that many changes to the Code are now necessary and urgent, in light of the experience of dairy farmers with its operation over, now, three years.
- a. Even at its making, the ACCC noted it would not fully correct the bargaining power imbalance, but would merely reduce some of the negative consequences.
 - b. This assessment also underpins their 2021 submission to the review of the dairy code².

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https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Dairy%20Code%20of%20Conduct%20Review_0.pdf

Dairy Farmers, Processors, and Supermarkets

19. Most dairy farmers sell their product to milk processors, who collect the milk from farms via tanker, and then process and package it according to the instructions they receive from
- a. their own brands, where milk processors provide their branded dairy products to retailers for them to sell, and
 - b. retailers, who sell under the retailer's own brands to the public, called 'private label' products.
20. Some dairy farmers sell their milk directly to retailers, with milk processors receiving that milk on behalf of the retailers, and processing and packaging it for the retailers, while at no stage owning the milk. All of this milk becomes a private label product, and this arrangement is called tolling.
21. The proportion of milk bought and sold as private label dairy products varies by region, and an analysis can be found in the annual *In Focus* report produced by Dairy Australia³.
22. The volume of private label milk consumed in Australia far exceeds the volume of branded milk, and hence the pricing of private label milk (and other private label dairy products) can exert a powerful influence over the pricing of branded dairy products.
23. Supermarkets show a clear preference for very large dairy farms, and we expect very large suppliers of other perishable goods, too, for their private label products, and they often attract such suppliers by paying a more attractive price. This practice has multiple impacts and implications:
- a. The supermarkets, because of their greater knowledge of supply chain costs and their complete control over their private label margins, can attract particular suppliers by paying a better price.
 - b. Their suppliers can be more positive about their relationship with the supermarkets, than others in the sector.
 - c. Milk processors and wholesalers must then access and contract with smaller suppliers. There is a relationship between supplier size and their capacity to see the cost and efficiency benefits arising from larger scale production/operation. This can mean the supply cost is higher than via the tolling route.
24. In their 2018 Report, the ACCC said

“Evidence obtained by the ACCC under our information gathering powers demonstrated that almost all contracts for the supply of private label milk have clauses that allow processors to pass-through movements in farmgate prices to supermarkets. As a result, there is no direct relationship between retail private label milk prices and farmgate prices. For this reason, changes to the retail price of private label milk are unlikely to result in any changes in the farmgate milk price received by farmers,

³ <https://www.dairyaustralia.com.au/industry-statistics/industry-reports/australian-dairy-industry-in-focus>

because processor profits on private label milk are not influenced by whether farmgate prices are high or low.

“This suggests that measures to improve the bargaining power of farmers in their interactions with processors are a more appropriate mechanism to ensure the pricing policies of retailers do not cause undue long-term harm to the industry.”⁴

25. This proposition, while reflecting what was provided to the Australian Competition and Consumer Commission, does not reflect the real world.

⁴ Page xxi, summarising material elsewhere in the Australian Competition and Consumer Commission 2018 report.

Processors, Suppliers, and Supermarkets

26. The relationship between dairy processors and supermarkets is in part addressed by the unenforceable, optional, and penalty-free, Food and Grocery Code of Conduct.
27. Staff of processors, including senior staff, tell us they have never looked at the Code, nor been trained in it – it is treated as irrelevant to their business. To the extent their work routines are influenced by the Code, they are unaware of that.
28. Many reviews have recommended making that code mandatory, but successive governments have been too afraid of the power of the big supermarkets to take that action.
29. Reviewers and reviews have probably also been advised that the market functions well and it would be wrong to intervene – the standard (and often wrong) advice from ideology-driven economists – and governments have been able to cite that advice as the reason for not intervening.
30. We note that the current cost of living crisis across Australia is, in part, the consequence of that timidity.
31. We also note that the current lack of confidence in supermarkets has driven multiple inquiries aimed at pressuring those supermarkets to moderate their profits.
 - a. If they do so voluntarily and such a tactical and cynical moderation is seen as making it unnecessary to regulate their behaviour, then the Government will have let down the community.
32. The members of eastAUSmilk have frequent contact with milk processor companies at the local level and upwards, and we also actively engage with processors at more senior levels.
33. Every last one of those processors, and many other suppliers to supermarkets, has horror stories to tell about being bullied by supermarkets, but they will not tell those stories. They tell our members, who tell us, or tell us directly, but they will not speak up for fear of supermarkets taking action to impair their business.
34. They know that if they are identified as the source of a negative story about a major supermarket, there are a myriad of ways, small and large, their business will be made to suffer.
 - a. Their products will no longer be at eye level on shelves, or within easy reach.
 - b. It might take hours to restock their products on shelving, once sold out.
 - c. The proportion of shelf space devoted to private label products can increase by reducing the shelf space for branded products.
 - d. Supermarkets can, in some circumstances, place their tolling and plain label processing with other processors.
 - e. Supermarkets wanting to punish a processor will reduce their take, while at the same time paying a higher price to take milk from another processor, and reducing their margin, temporarily.

- f. The pass-through of farmgate price increases can be consciously delayed whenever a supermarket feels like it. Not all contracts specify timeliness, and even if they did the payments can be delayed by inventing queries about paperwork.
 - g. Equivalent practices to those raised by Queensland Fruit and Vegetable Growers association in recent media can also be used in relation to dairy processors.
35. eastAUSmilk members and processor staff/contractors have in many cases a low opinion of the overall integrity of larger supermarkets and will mention such examples as
- a. misleading labelling of “specials”,
 - b. misleading advertising (Hillview Cheese, packaged in green and gold but made overseas is mentioned),
 - c. focussing in labelling on weight when convenient, and volume when convenient, to encourage under-informed buying,
 - d. local supermarkets using cross-subsidised predatory pricing to eliminate local competition, and then raise prices again,
 - e. use of fonts so small as to be unreadable when notifying price per kilogram and other required or legitimate comparisons on labels/tags, and
 - f. misleading labelling more generally.
36. It is a normal requirement, but very wrong, that supermarkets require suppliers to invest in promotional and marketing activity.
- a. Failure to so invest leads to reduced or less preferential shelf space.
 - b. There is pressure to increase it every year.
 - c. The demand can include to take advertising in, or directly subsidise, the supermarket’s own marketing channels.
 - d. Supermarkets treat this impost as simply yet another income stream.
 - e. In reality, it is suppliers subsidising supermarkets.
37. Supermarkets can be quite paranoid when it comes to relations with suppliers. They have been known to accuse suppliers of being “in bed” with competitors, when competitor prices don’t increase in the same pattern as their own when supplier prices have been increased.
38. Having reviewed the mechanisms for taking revenge on suppliers, detailed in the *Four Corners* program of 19 February 2024 called *Super Power: The cost of living with Coles and Woolworths*⁵, eastAUSmilk agrees that these, and other similar tactics, are what processors and our members have described to us.

⁵ <https://www.abc.net.au/news/2024-02-19/super-power-the-cost-of-living-with-coles-and-woolworths/103486508>

39. Pass-through clauses, referenced above, are activated only if a processor chooses, and activated in full only if a processor chooses to seek to pass through the whole increase.
40. Given what we know of the fear of retribution from big supermarkets amongst some processors, they will resist farmgate price increases regardless of need or equity whenever they can – as they did for the whole of the period of dollar a litre milk. They have form, regardless of whether the ultimate pressure came from within, or from supermarkets.
41. Were processors prepared to speak up, even privately and confidentially, it would be clear to the Review and the government that the ACCC's rejection of interfering with retailer power, in their 2018 Dairy report, was quite wrong-headed.
- a. It is entirely ridiculous to suspect supermarkets were able to maintain a dollar-a-litre price for the private-label milk they sold because processors voluntarily, and to an extent unanimously, kept prices down.
 - b. Processors kept farmgate prices down because supermarkets pressured them to do so. The absence of public evidence for this is disappointing, and a testament to the willingness of processors to be pressured, but in no way diminishes the truth of the assertion.
42. While supermarkets have abandoned their dollar-a-litre milk pricing, this was not done after a change of heart about the ethics of the practice, nor a new-found concern for the sustainability of dairy farmers.
- a. They did not update their codes of behaviour or ethical requirements of staff, because they decided they were operating consistent with them – what they were doing, they felt, was consistent with their ethical obligations.
 - b. There is no reason to suspect a similar level of ruthlessness will not be applied to future dealings with wholesalers.
43. Making the grocery code mandatory will go some way to re-balancing the relationship between supermarkets and wholesalers.
44. Senior officers of processors have said to us unequivocally that the voluntary and unenforceable nature of the Fruit and Vegetable Code makes it entirely ineffective.
45. What governs the relationship between milk processors and supermarkets is not that Code, but processor fear of retaliation. That fear has supplanted the Code as the principal regulatory instrument.
46. The grocery market does not function efficiently and will not improve sufficiently while the Food and Grocery Industry Code is voluntary – that's the basis for the ACCC's past advice that the grocery code should be mandatory. As is the case with the experience in the dairy sector, making the Grocery Code mandatory would not fully correct the power imbalances in the grocery sector, but would reduce some of the negative consequences.

Supply Chain Margins

47. When the dairy industry was regulated, farmgate prices were prescribed, processor margins were reported, and retailer prices were public information.

48. We are not herein advocating a return to those days or systems, but current margins need to be considered in the context of historic margins, as part of testing whether price-gouging is happening at any point in the supply chain.

49. In April 2021, ACCC reviewed the impact of deregulation on Australian milk industry prices, margins, costs and profits.

50. They found⁶:

“From the June quarter to December 2000 quarter the gross margin on aggregate milk sales in supermarkets declined by 19 per cent with retail prices falling at a greater rate than wholesale prices. Despite sales volumes increasing by around six per cent, substantial reductions in per litre revenue led to an overall decrease in aggregate revenue derived from supermarket milk sales during this period.

“The average net profit margins of Australian milk processors decreased by around 12 and 18 per cent respectively on a per litre basis for the September and December 2000 quarters relative to the June 2000 quarter. As the total volume of milk sold in Australia was relatively constant over this period, the overall profitability of milk processors decreased following deregulation. Although price discounting of branded milk products fell away in the December 2000 quarter, net profit margins remain considerably lower than for periods before deregulation.”

51. We are advised of one recent example where a supermarket set their price with processors on the basis of a 42 percent margin between their shelf price and what they would pay a processor. We doubt they will acknowledge that, publicly.

52. eastAUSmilk firmly believes that supermarket margins are excessive, and contribute to cost of living pressures.

53. Sunlight is the best disinfectant, and we believe that the government, perhaps via the Australian Competition and Consumer Commission, should continue to monitor the product line margins of the major supermarkets.

- a. This will help ensure any behaviour change arising from current reviews of supermarket profit-making is embedded and not fleeting.
- b. Some form of public reporting will be necessary.
- c. Supermarkets have the technology to report this information for all product lines, easily, and in almost real time.

54. Supermarkets will reject this as undermining a competitive market, but the way major supermarkets acquire and sell product is not a properly competitive market but more a duopoly, so that argument rests on a false presumption.

⁶ <https://www.accc.gov.au/media-release/big-gains-to-consumers-from-dairy-deregulation>

55. They will also claim such an obligation is unduly burdensome, but this is simply not correct.
56. There are several options open to Government in addressing this proposition via modifying the Food and Grocery Code:
- a. No monitoring of margins, as at present
 - b. Monitoring of margins on a confidential basis by a trusted government entity such as Australian Competition and Consumer Commission,
 - c. Monitoring of margins on a confidential basis by a trusted government entity such as Australian Competition and Consumer Commission, with some level of external validation, and
 - d. Monitoring and publishing of margins by a government entity.
57. We believe this is warranted because supermarkets, demonstrably exploiting the community to make excessive profit, are rapidly losing their social license to operate as they do.
58. This loss of confidence amongst the community, of the integrity and *bone fides* of supermarkets, as a driver for such an intervention, ensures this cannot be seen as policy overreach nor a precedent for other industries.
59. However, a further issue would need to be addressed: ensuring that supermarkets do not seek changes to supply contracts designed to make up what had been lost through reduced margins.

Retaliation

60. There is a reluctance to speak out publicly, or even confidentially, against the behaviour of supermarkets. There is an expectation of retaliation. Both our members and the staff of milk processors tell us so.
61. We are advised that senior staff of supermarkets have been heard to boast of the careers and companies they have damaged or ruined by taking undocumented retaliatory action, and they claim this as a badge of honour.
- a. Making such a boast can only be taken by suppliers to be a warning they must not speak up.
 - b. Even small acts of vindictive behaviour can have major impacts on supplier income and viability.
 - c. The capacity to intimidate is particularly powerful when the supplier in question is providing perishable or limited life goods – the supplier knows they have no options if any action is taken by supermarkets. They can't take goods back, can't divert them elsewhere, can't delay shipping to smooth out supply curves ... and their product will be worthless very quickly.
62. An increasing number of eastAUSmilk members sell directly to retailers, as set out above at paragraph 20, and many of them report a healthy and positive relationship with their retailer.
- a. However, others say they are reluctant to raise problems or press for contract changes, because it could put at risk that business relationship most important for viability.
63. At a senior and corporate level, supermarkets will say they have code of conduct and ethical principles which rule out such behaviour.
64. Some may say their training addresses these issues.
65. To the extent they have such policies, practices, and training, they are at best questionable, and information from staff of processors and supermarkets, and from our members, suggests they are ineffective.
- a. We are advised the retaliatory culture discussed above extends into such senior managers as commercial and category managers.
 - b. Suppliers well understand that a category manager has the necessary power over the supply chain to maim or destroy their business.
66. Smart supermarkets will understand it is not in the interests of their companies for retaliatory behaviour to be applied to suppliers, regardless of the issue.
67. Less smart operators would see it as sufficient to be merely seen to discourage such behaviour, and certainly to not be caught.
68. Supermarket strategies might reject retaliatory behaviour, but there is a widespread perception that retaliation occurs, and it is sufficiently widespread that suppliers are logical in their fear of making a complaint.

- a. Processors uniformly reject the proposition that lack of complaints under the Code reflect a properly functioning Code – that lack reflects fear.

69. The culture in such supermarkets overtakes and undermines the strategic intent. As well-known business analyst Peter Drucker said: “*Culture eats strategy for breakfast*”.

70. A smart business should understand that if behaviour, or perceptions around it, is undermining strategy, or social license, then they need to do more than go into denial.

71. That’s particularly so when the belief about bad behaviour, or the bad behaviour itself, is widespread.

72. Doing more than denial should involve ensuring, at least:

- a. There is a policy which:
 - i. recognises feedback from suppliers, even inconvenient or negative feedback, provides business value and is wanted,
 - ii. recognises truly respectful relationships between retailers and suppliers are a business-critical priority, and
 - iii. bans retaliatory behaviour.
- b. Training is provided to all staff who engage with suppliers, focussed on culture and behaviour change, not just a lecture designed to tick a box.
- c. Business leaders model best practice behaviour when it comes to bullying and retaliation internally, and this behaviour is recognised and important in recruitment and promotion processes.

73. In short, larger parties to the Code should be encouraged to embed policies, practices, and training which are effective in eliminating retaliatory and bullying behaviour.

74. The following paragraphs set out a more “best-practice”, rather than bare-minimum, approach.

Best Practice in Eliminating Retaliatory Behaviour

75. Organisations take various measures to ensure they meet their obligations under anti-retaliation provisions in commercial dispute resolution statutes and processes. some examples⁷ follow.
76. **Clear Policies and Procedures:** Many organisations develop clear policies and procedures outlining the process for reporting disputes and grievances, including provisions that explicitly prohibit retaliation against individuals who report violations or participate in dispute resolution processes. These policies are communicated to all employees and stakeholders.
77. **Training and Education:** Organisations invest in training and education programs to raise awareness among employees and managers about the importance of anti-retaliation provisions. This training typically covers the rights and responsibilities of employees, the consequences of retaliation, and the procedures for reporting concerns.
78. **Anonymous Reporting Mechanisms:** Providing anonymous reporting mechanisms allows employees to report disputes or concerns without fear of retaliation. This can include hotlines, online reporting platforms, or third-party ombudsperson services that ensure confidentiality.
79. **Independent Review Processes:** Organisations may establish independent review processes or committees responsible for investigating complaints of retaliation impartially. These bodies ensure that disputes are handled fairly and without bias, enhancing trust in the organization's dispute resolution mechanisms.
80. **Documentation and Record-Keeping:** Maintaining detailed documentation of dispute resolution processes, including complaints, investigations, and outcomes, helps organisations demonstrate their commitment to addressing disputes and preventing retaliation. Proper record-keeping also ensures transparency and accountability.
81. **Performance Evaluation and Accountability:** Incorporating compliance with anti-retaliation provisions into performance evaluation criteria for managers and supervisors reinforces the organization's commitment to preventing retaliation. Holding individuals accountable for any acts of retaliation sends a clear message that such behavior will not be tolerated.
82. **Regular Audits and Reviews:** Conducting regular audits and reviews of dispute resolution processes allows organisations to identify any gaps or areas for improvement in their compliance with anti-retaliation provisions. These audits can be internal or conducted by external auditors or regulatory bodies.
83. **Engagement with Stakeholders:** Engaging with stakeholders, including employees, unions, regulatory agencies, and advocacy groups, fosters open communication and collaboration in addressing disputes and ensuring compliance with anti-retaliation provisions. Soliciting feedback and incorporating suggestions for improvement

⁷ The information in paragraphs 65 to 73 was sourced from CHAT-GPT and edited.

demonstrate a commitment to continuous enhancement of dispute resolution processes.

Responses to Consultation Questions

1. What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?

There should be a focus on sustainability, including fairness and profitability, in the whole supply chain, and the enormous market power supermarkets have over processors and farmers must be reduced to create a more properly competitive market.

The capacity of supermarkets to increase shelf price beyond increases to input costs must be curtailed. Not only is it inflationary and unfair to consumers, when it applies to products competing with supermarket private label products (and there are many examples of this) it is an attempt to unfairly compete, distort the market, and harm the business of their supplier.

Regional pricing must be addressed in code changes. At present, local suppliers in high cost regions cannot achieve sustainable prices, and those with a national footprint are forced to lose money in high cost regions, or pressure suppliers to accept prices which impoverish them and risk business failure. In the long run, this will force farmers, processors/wholesalers, or both, to close down, meaning that consumers in high cost areas cannot access these products. Many fresh produce lines see variable production and distribution costs between regions reflecting differences in costs. In some, like milk, the power of retailers ensures suppliers are constantly on the cusp of bankruptcy.

Consideration should be given to processes which stop retailers embedding⁸ losses in any products in any regions, as this is often the source of inappropriate pressure on processor/wholesaler and supplier viability. The disgraceful period of dollar a litre milk is a case in point.

Retaliation action by retailers must be stopped – see elsewhere in this submission.

Retailers apply smaller margins to their own brands to increase sales compared to other brands. This is anti competitive and there needs to be strong regulation to address this massive conflict of interest, always exercised by retailers in their own interests.

Dairy farmers and some processors would support inclusion in the Code of a preference of some kind being given to Australian domestic suppliers.

2. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

In all instances, suppliers are price takers, and this is the source of the power imbalance – price and other negotiations are not between equals.

Currently the Code has zero impact on addressing imbalances, and this is the main issue which must be fixed through this review.

Amendments to a voluntary Code are pointless.

⁸ Not the same as deploying special pricing from time to time.

An extraordinary example of the most egregious misuse of market power is the use of “mitigation” requirements – which are not always written. Supermarkets have been known to agree to a price increase for a supplier and commensurate increase in their shelf price, but on the condition that if their major competitor does not similarly increase shelf price then all or part of the price increase to the supplier will be foregone.

3. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?

Supermarket knowledge of supplier price structures and margins, particularly but not exclusively with branded products, gives supermarkets significantly increased power, and increases the imbalance which otherwise applies.

That imbalance is increased when it comes to perishable or short shelf life products.

Not only processors/wholesalers in perishable food, and farmers, but large international suppliers are known to have scaled back or left Australia in the face of our current uncompetitive duopoly.

4. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

It might be unnecessary to address this in the course of the current Code Review, as the power imbalance is so enormous in so much of the sector that we see this as a second-order issue. This review might identify this as an issue to be resolved in the future, unless substantive submissions are received on the topic.

5. Should the Code be extended to cover other aspects of the food and grocery supply chain?

We do not support in any way reducing the strength of the Dairy Industry Code – rather, it is in need of urgent strengthening.

6. Should some or all alcoholic beverages be included in the scope of the Code?

We are not sufficiently aware of whether market power is misused in this retail/wholesale sector, but we presume the same misuses and bullying operate from the same major retailers, everywhere they can improve their profitability.

7. Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code’s signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

If evidence is provided that other players in the supply chain mis-use their market power then the Code should be extended.

8. Do the provisions set out under the Code ensure it is fit for purpose?

The current Code is not fit for purpose, for the reasons advanced elsewhere in this submission. However, amendments to a voluntary Code are pointless – i.e. cannot make it fit for purpose.

9. Which provisions under the Code help or hinder suppliers? How can the provisions be improved?

The entire basis of the current Code is that retailers can be trusted to operate honourably, so the whole Code without enforceability, in providing a false veneer of protection and balance, undermines the interests of suppliers.

A ban on lower supermarket margins for unbranded or private label products with limited (say, less than 30 days) of shelf life should see the margin and hence price applied to branded products reduced, which would reduce market distortion and benefit customers.

10. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

We do not support in any way reducing the strength of the Dairy Industry Code – rather, it is in need of urgent strengthening.

Australian Dairy Farmers has done an analysis of the content of each of the Dairy Industry Code and the Food and Grocery Industry Code, and finds considerable overlap and complementarity. Their analysis was part of their confidential submission to the Australian Competition and Consumer Commission review of the acquisition by Coles of two Saputo dairy processing facilities. They may, upon request, be prepared to release the whole of that submission, or the relevant part.

11. What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?

Too many overseas jurisdictions have no or ineffective regulation to be of great value, and none, as far as we are aware, have a market duopoly as we do, combined with effective regulation.

However, our submission addresses international best practice in one respect, and that is in reducing bullying and retaliatory behaviour.

12. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?

Presuming the fear of retaliation can be overcome, the dispute resolution processes need to be built to recognise that perishable product issues must be addressed urgently. One of the biggest weapons supermarkets have in dealing with the suppliers of perishables is that those suppliers cannot dispute anything said by the supermarket's representatives about a perishable product, because by the time anything is resolved the product is unsaleable. Members have provided examples of entire truckloads of produce being destroyed in these circumstances.

A model which spreads costs equally will not work, because that just embeds one aspect of the power imbalance. What's more important is fixing retailer culture and behaviour.

13. What benefits could a mandatory code bring to suppliers?

Amendments to a voluntary Code are pointless.

The eastAUSmilk experience, outlined above, is that while our mandatory dairy code did not solve all problems and now requires urgent strengthening, Code introduction brought a significant improvement to the balance of power, and to the lives of dairy farmers.

Without a doubt, the same effect would be seen if the Food and Grocery Code was mandated.

14. If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?

Single store operators should not be covered, unless part of a franchise and branded business.

15. Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

No comment to offer, other than the current system is entirely untested, so clearly isn't working.

16. Are Code Arbiters perceived to be independent from the supermarkets that they oversee?

Member and processor feedback is that they are not seen as independent.

17. If not, how could the reality and perception of independence of Code Arbiters be enhanced?

A mandatory Code, with Australian Competition and Consumer Commission supervision and enforcement, will resolve this issue.

18. Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

Our submission at paragraphs 60 to 83 addresses this issue, and we have suggested both a minimum standard which could be imposed, and a more best-practice approach. It is critical for the future of the sector that this issue is resolved.

19. Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?

As mentioned above, members, and the people they and eastAUSmilk speak with at retailers and processors, make it clear to us that the Code is ignored when convenient, particularly so by less senior staff. But it is their managers and more senior managers who create and allow such a culture to thrive.

20. Should civil penalties be available for breaches of the Code?

Yes.

21. If civil penalties are to be applied to the Code, what penalties are appropriate?

Vicarious liability should apply to a retailer breaching the Code.

We suggest a scale of fines commensurate with the size of the offending business – only massive fines will ensure a recalcitrant retailer will change, if they are not doing so.

Remediation of the situation of the supplier should be the minimum default order, regardless of the cost to the retailer.

Repeated breaches should attract a criminal penalty.